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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. JULIO ALFONSO RUIZ-MONTANO, Defendant.	Criminal Case No. 08CR0541-WQH Date: April 18, 2008 Time: 1:00 p.m. The Honorable William Q. Hayes **UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTIONS TO** **1) COMPEL DISCOVERY;** **2) DISMISS THE INDICTMENT; AND** **3) GRANT LEAVE TO FILE FURTHER MOTIONS** **TOGETHER WITH STATEMENT OF FACTS, MEMORANDUM OF POINTS AND AUTHORITIES**

The plaintiff, UNITED STATES OF AMERICA, by and through its counsel, Karen P. Hewitt, United States Attorney, and Joseph J.M. Orabona, Assistant United States Attorney, hereby files its Response in Opposition to Defendant's above-referenced Motions. This Response in Opposition is based upon the files and records of the case, together with the attached statement of facts and memorandum of points and authorities.

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I

STATEMENT OF THE CASE

On February 27, 2008, a federal grand jury in the Southern District of California returned an Indictment charging Julio Alfonso Ruiz-Montano ("Defendant") with one count of attempted entry after deportation, in violation of 8 U.S.C. § 1326(a) and (b). On February 28, 2008, Defendant was arraigned on the Indictment and pled not guilty. The Court set a motion hearing for April 18, 2008. On March 28, 2008, Defendant filed his discovery motion and motion to dismiss the Indictment. The United States files the following response in opposition to Defendant's discovery motion and motion to dismiss.

II

STATEMENT OF FACTS

A. OFFENSE CONDUCT

On February 2, 2008, at approximately 10:15 p.m., United States Border Patrol Agent E. Uskokovic was informed by a Remote Video Surveillance System Operator that three individuals were climbing over the international boundary fence approximately 3.5 miles east of the Calexico Port of Entry. The Remote Surveillance Operator maintained constant visual of the suspects and provided Agent Uskokovic with the location of the individuals. Agent Uskokovic searched the area and found three individuals attempting to conceal themselves behind some brush. All three individuals, including one later identified as Julio Alfonso Ruiz-Montano ("Defendant"), admitted to being citizens and nationals of Mexico with no documents to be in the United States legally. All three individuals were arrested and transported to the Calexico Border Patrol Station for processing.

B. DEFENDANT'S IMMIGRATION HISTORY

A routine records check confirmed that Defendant is a citizen and national of Mexico, and that defendant subsequently was lawfully excluded, deported, and removed from the United States to Mexico. An immigration judge ordered Defendant excluded, deported, and removed from the United States to Mexico on September 5, 2002. After the last time Defendant was lawfully ordered excluded, deported, and removed from the United States, there is no evidence in the reports and records maintained by the Department of Homeland Security that Defendant applied to the U.S. Attorney General or the Secretary of the Department of Homeland Security to lawfully return to the United States.

C. DEFENDANT'S CRIMINAL HISTORY

Defendant has a criminal history. The United States, propounds that Defendant has five criminal history points placing him in Criminal History Category III. On July 22, 1998, Defendant pled guilty and was convicted of assault with a deadly weapon, to wit, a firearm, in violation of California Penal Code § 245(a)(2), and was sentenced to a total of 5 years in prison.

III

THE UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTIONS ALONG WITH MEMORANDUM OF POINTS AND AUTHORITIES

A. DEFENDANT'S MOTION TO COMPEL DISCOVERY SHOULD BE DEINED

As of the date of this Motion, the United States has produced 53 pages of discovery (including reports of the arresting officers and agents, a criminal history report, documents concerning Defendant's prior convictions and immigration history), 1 DVD-ROM containing Defendant's videotaped, post-arrest statement, and 3 tapes containing an audio recording of Defendant's deportation hearing before an immigration judge on September 5, 2002.

1. United States' Discovery Obligations

The United States will continue to comply with its obligations under Brady v. Maryland, 373 U.S. 83 (1963), the Jenks Act (18 U.S.C. §3500 et seq.), and Rule 16 of the Federal Rules of Criminal Procedure ("Fed. R. Crim. P."). At this point the United States has received **no** reciprocal discovery. In view of the below-stated position, the United States respectfully requests the Court issue no orders compelling specific discovery by the United States at this time.

As to exculpatory information, the United States is aware of its obligations under Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1972) and will comply. The United States will also produce any evidence of bias/motive, impeachment or criminal investigation of any of its witnesses of which it becomes aware. An inquiry pursuant to United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991) will also be conducted. However, the United States will not produce rebuttal evidence in advance of trial. See United States v. Givens, 767 F.2d 574, 584 (9th Cir. 1984).

The United States has already provided Defendant with a copy of his criminal record and related court documents, in accordance with Fed. R. Crim. P. 16(a)(1)(D). See United States v.

Audelo-Sanchez, 923 F.2d 129, 130 (9th Cir. 1990). Should the United States determine that there are any additional documents pertaining to Defendant's prior criminal record, those documents will be promptly provided to Defendant.

The United States has provided information within its possession or control pertaining to the prior criminal history of Defendant. If the United States intends to offer any evidence under Rule 404(b) or 609 of the Federal Rules of Evidence, it will provide notice promptly to Defendant. The United States will produce any reports of experts that it intends to use in its case-in-chief at trial or such reports as may be material to the preparation of the defense.

The United States will provide a list of witnesses in its trial memorandum. The grand jury transcript of any person who will testify at trial will also be produced. The United States has complied and will continue to comply with Fed. R. Crim. P. 16(a)(1)(G) and provide Defendant with notice and a written summary of any expert testimony that the United States intends to use during its case-in-chief at trial under Fed. R. Evid. 702, 703, or 705. The United States will also provide Defendant with any scientific tests or examinations in accordance with Rule 16(a)(1)(F).

In sum, the United States has already produced reports, criminal history documents, charging documents, a DVD the post-arrest statements, and three deportation tapes. To the extent Defendant requests specific documents or types of documents, the United States will continue to disclose any and all discovery required by the relevant discovery rules. Accordingly, the United States respectfully requests that no orders compelling specific discovery by the United States be made at this time.

2. Alien File

The United States objects to Defendant's request for a "full copy" of his Alien File ("A-File"). In addition, the United States objects to Defendant's request to inspect his A-File. This information is equally available to Defendant through a Freedom of Information Act request. Even if Defendant could not ascertain the A-File through such a request, the A-File is not Rule 16 discoverable information. The A-File contains information that is not discoverable like internal government documents and witness statements. See Fed. R. Crim. P. 16(a)(2). Witness statements would not be subject to production until after the witness for the United States testifies and provided that a "motion" is made by Defendant. See Fed. R. Crim. P. 16(a)(2) and 26.2. Thus, the A-File associated with Defendant need not be disclosed.

Defendant claims that the A-File must be disclosed because (1) it may be used in the United States' case-in-chief; (2) it is material to his defense; and (3) it was obtained from or belongs to him. See Fed. R. Crim. P. 16(a)(1)(E). The United States will produce documents it intends to use in its case-in-chief. Evidence is material under Brady only if there is a reasonable probability that had it been disclosed to the defense, the result of the proceeding would have been different. See United States v. Antonakeas, 255 F.3d 714, 725 (9th Cir. 2001). However, Defendant has not shown how documents in the A-File are material. Finally, Defendant does not own the A-File. It is an agency record. Cf. United States v. Loyola-Dominguez, 125 F.3d 1315 (9th Cir. 1997) (noting that A-File documents are admissible as public records). Should the Court order inspection of relevant documents from the A-File, the United States will facilitate the inspection as it does in other cases.

B. DEFENDANT'S MOTION TO DISMISS INDICTMENT SHOULD BE DENIED

Defendant asserts that the indictment "fails to state an offense, since it does not allege that Mr. Ruiz-Montano committed an overt act – a required element in 'attempt' cases." [Def. Motion at 3.] Defendant's motion to dismiss the indictment is based on a Ninth Circuit case that has been overruled by the Supreme Court. [Def. Motion at 3-5 (relying on United States v. Resendiz-Ponce, 425 F.3d 729 (9th Cir. 2005), overruled by -- U.S. --, 127 S.Ct. 782, 166 L.Ed.2d 591 (2007).] As such, Defendant's argument is foreclosed by Supreme Court precedent.

Federal Rule of Criminal Procedure 7(c)(1) provides that an indictment "must be a plain, concise, and definite written statement of the essential facts constituting the offense charged." In Resendiz-Ponce, the Supreme Court expressly held that an indictment alleging attempted illegal reentry need not specifically allege a particular overt act or any other component part of the offense. See 127 S.Ct. 782, 787-88 (emphasis added). The Court noted that "[n]ot only does the word 'attempt' as used in the common parlance connote action rather than mere intent, but more importantly, as used in the law for centuries, it encompasses both the overt act and intent elements." Id. at 787. The word "attempt" coupled with the specification of the time and place of the defendant's attempted illegal reentry was sufficient to inform the defendant of the charges against him and to enable ample protection against multiple prosecutions for the same crime. Id. at 788 (applying the logic in Hamling v. United States, 418 U.S. 87, 117-19, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974)). For these reasons, the Court concluded that the indictment in Resendiz-Ponce complied with Rule 7(c)(1) and did not deprive the defendant of any significant constitutional protections. Resendiz-Ponce, 127 S.Ct. at 788.

Defendant also argues that the indictment should be dismissed because it does not allege an overt act that was a "substantial step towards committing the offense." [Def. Motion at 4-5.] This argument, too, is foreclosed by the Supreme Court's holding in Resendiz-Ponce. The Court held that the words - "took a substantial step" - were implicit in the word "attempt." Id. at 788 n.4. As such, the Court did not believe that adding those four words to the indictment would have given the defendant any greater notice of the charges against him or protection against future prosecution. Id.

Similar to the indictment in Resendiz-Ponce, the indictment in this case implicitly alleged that Defendant engaged in the necessary overt act by simply alleging that Defendant "attempted to enter the United States" by crossing the border from Mexico into the United States on or about February 2, 2008. This is sufficient to allege the elements of the offense, and therefore, the indictment was not defective. See id. at 787-88. Adding the words "took a substantial step" would not have given Defendant any greater constitutional protection. See id. at 788 n.4. Thus, Defendant's motion to dismiss the indictment on this ground should be denied.

C. DEFENDANT'S MOTION FOR LEAVE TO FILE FURTHER MOTIONS

The United States does not oppose Defendant's request to file further motions if they are based on new discovery or other information not available to Defendant at the time of this motion hearing.

IV

CONCLUSION

For the foregoing reasons, the United States requests the Court deny Defendant's Motions to Compel Discovery, Dismiss the Indictment, and Grant Leave to File Further Motions, unless unopposed.

DATED: April 10, 2008.

Respectfully submitted,

KAREN P. HEWITT
United States Attorney

/s/ Joseph J.M. Orabona
JOSEPH J.M. ORABONA
Assistant United States Attorney

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff,

v.

JULIO ALFONSO RUIZ-MONTANO, Defendant.

Criminal Case No. 08CR0541-WQH

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that:

I, Joseph J.M. Orabona, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of **The United States' Response in Opposition to Defendant's Motions to Compel Discovery, Dismiss the Indictment, and Grant Leave to File Further Motions** on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

Diane Marie Regan, Esq.
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101-5008
Lead Attorneys for Defendant

A hard copy is being sent to chambers.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 10, 2008.

/s/ *Joseph J.M. Orabona*
JOSEPH J.M. ORABONA
Assistant United States Attorney